STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2012
v	No. 303283 Wayne Circuit Court
BRANDON DENARDO CRAWFORD, Defendant-Appellant.	LC No. 10-009294-FH

Before: M. J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

Defendant Brandon Denardo Crawford appeals by right his bench convictions of two counts of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to serve three years on probation for the possession of cocaine convictions and to serve two-years in prison for the felony-firearm conviction. Because we conclude that there were no errors warranting relief, we affirm.

Defendant's convictions arise from the events surrounding the execution of a search warrant at a house. Police officers testified that they executed the search warrant and discovered defendant and another man, Cornelius Barnes, in the home. The officers stated that both men were seated at a table strewn with drugs, drug paraphernalia, and money; there was also a handgun on the table. Defendant contradicted this testimony; he testified that he was just visiting, was not seated at the table, and that the table was empty.

Defendant first argues that the trial court erred by allowing officers to offer improper drug profiling evidence at trial, by permitting the officers to testify as experts without being admitted as experts, and by permitting the officers to testify as both expert and lay witnesses. Because defendant did not object to the challenged testimony, this issue is unpreserved and we will review it for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant contends that the officers' testimony regarding the evidence found on the table and its significance constituted improper drug profile evidence. A profile is a list of usually innocuous characteristics that police believe to be typical of a person engaged in a particular illegal activity. *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). "Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit, such as the use of pagers, the carrying of large amounts of cash, and the

possession of razor blades and lighters in order to package crack cocaine for sale." *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). Drug profile evidence is not admissible as substantive evidence of guilt. *Hubbard*, 209 Mich App at 241. On the other hand, expert testimony is admissible "to explain the significance of items seized and the circumstances obtaining during the investigation of criminal activity." *Murray*, 234 Mich App at 53.

In this case, the officers explained the significance of the scales, sifter, sandwich bags, and hanger which, otherwise innocuous in and of themselves, can be used to make, weigh, package, and sell drugs. *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993). Because the testimony did not relate otherwise innocent characteristics to defendant in order to establish his guilt, it was not profile evidence. *Murray*, 234 Mich App at 62-63.

Defendant next contends that the officers' testimony regarding the significance of the physical evidence was improper because the officers were not admitted as expert witnesses under MRE 702. We agree that because testimony of the type offered here "was not within the knowledge of a layman," it constitutes expert testimony. *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991). Here, plaintiff failed to lay a foundation for the officers' expert testimony by showing that they had specialized knowledge regarding narcotics activity based on their experience, training, or education and the court failed to find that specialized knowledge would assist it in understanding the evidence or determining a fact in issue. MRE 702. Accordingly, it was plain error to permit them to offer what amounted to expert testimony.

Nevertheless, although it was plain error, it was not outcome determinative. First, while defendant takes issue with the fact that plaintiff did not offer the officers as experts in the field of narcotics trafficking, he does not challenge the accuracy of their testimony and has not shown that, had a proper foundation been laid, they could not have been qualified as expert witnesses. See *United States v Oriedo*, 498 F3d 593, 604 (CA 7, 2007). Defendant's contention that the officers' testimony would not have assisted the trier of fact because this was a bench trial conducted by an experienced judge is without merit because a judge must decide a case based on the evidence presented and cannot rely on his own specialized knowledge. *People v Simon*, 189 Mich App 565, 567-568; 473 NW2d 785 (1991). Second, the scales, sifter, and other items were significant in that they tended to show that defendant was packaging the drugs for sale and thus that he intended to deliver them. However, an intent to deliver can generally be inferred from the quantity of drugs involved and the way in which they are packaged. *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992). Here, there was clear evidence—even without the aid of expert testimony—from which the trial court could find that defendant had the intent to sell: there was testimony that defendant was found with 200 packets containing small amounts of suspected drugs. Third, defendant did not dispute that whoever possessed the drugs must have intended to deliver them. Rather, the crux of his defense was that he was not the person who possessed the drugs because he was not the person described in the search warrant; he was a mere visitor to the house and did not know the drugs and drug paraphernalia were present. Fourth, there is nothing in the record to indicate that the trial court took the officers' expert testimony into account in resolving the issue of witness credibility. See *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). Rather, it decided the issue of credibility based on the fact that the officers gave consistent accounts of what happened that day and their testimony was supported by the physical evidence while defendant gave an implausible account of how he happened to be alone in the house with Barnes. Therefore, the error was harmless.

Finally, defendant takes issue with the fact that the officers testified as both lay and expert witnesses. In *United States v Lopez-Medina*, 461 F3d 724 (CA 6, 2006), the court held that an officer is not prohibited from testifying as both a lay and an expert witness, but when he does so, the court and the prosecutor "should take care to assure that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness, so that the jury can give proper weight to each type of testimony." *Id.* at 743 (citation and internal quotation marks omitted). Specifically, defendant argues that the prosecutor should have created a "clear demarcation" between the officer's lay and expert testimony and the trial court should have given a "cautionary jury instruction" regarding the officer's dual witness roles. *Id.* at 745. This case, however, involved a bench trial in which the trial court was presumed to have followed the law. *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971). Further, in a bench trial, the court is not required to instruct itself in the same manner as it would a jury. *People v Cazal*, 412 Mich 680, 691 n 5; 316 NW2d 705 (1982). Because defendant has not offered any evidence to rebut the presumption that the court followed the law, he has failed to establish plain error.

Defendant also argues that his trial lawyer was ineffective for failing to object to the officers' testimony. Because the trial court did not hold an evidentiary hearing on this claim, we review for errors apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish that a defendant's right to the effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Because the testimony did not constitute inadmissible drug profile evidence, defense counsel was not ineffective for failing to object. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). It was not unreasonable for defendant's lawyer to refrain from objecting when the prosecutor elicited expert testimony from the officers without first having them qualified as experts because defendant did not dispute that whoever possessed the drugs intended to deliver them. Even if his lawyer should have objected, defendant was not prejudiced by counsel's omission for the reasons previously discussed. Finally, because there is nothing in the record to rebut the presumption that the trial court knew the law, *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988), there was no reason for defendant's trial lawyer to lecture or caution the trial court about the law applicable to the officers' testimony.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio